

TESTIMONY OF

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CWA-UAW LEGISLATIVE ALLIANCE

on the subject of

THE CHEMICAL FACILITY ANTI-TERRORISM ACT OF 2009 (H.R. 2868)

and

THE DRINKING WATER SYSTEM SECURITY ACT OF 2009 (H.R. 3258)

before the

SUBCOMMITTEE ON ENERGY AND THE ENVIRONMENT

COMMITTEE ON ENERGY AND COMMERCE

UNITED STATES HOUSE OF REPRESENTATIVES

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Chairman Markey, Ranking Member Upton and Members of the Subcommittee, thank you for the opportunity to testify today. I am Dr. Darius Sivin, a Legislative Representative for the CWA-UAW Legislative Alliance, which represents more than two million active and retired workers who are members of the Communications Workers of America (CWA) and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW). I have been serving as a legislative representative for the UAW for approximately two years. Before that, I worked in the UAW Health and Safety Department as an industrial hygienist.

The CWA-UAW Legislative Alliance appreciates the opportunity to testify before this Subcommittee on the Chemical Facility Anti-Terrorism Act of 2009 (H.R. 2868) and the Drinking Water System Security Act of 2009 (H.R. 3258). We strongly support these two important measures, and urge this Subcommittee and the entire House to give them prompt, favorable consideration.

Importance of Chemical Security

Chemical security is an issue of great concern for organized labor because our members will get hurt first and worst in the case of an attack. It is a matter of concern to the UAW and the CWA because both unions represent members at facilities potentially covered by this legislation. The UAW represents members at approximately 15 facilities that are required to file EPA risk management plans are therefore potentially covered by H.R. 2868 or H.R. 3258. These include a wastewater facility in Detroit and a chemical manufacturer in Adrian, MI, both of which use chlorine gas by the rail car. Many of our members live and work in the vulnerability zone of the Detroit wastewater facility, which includes over 2 million people. We have additional members in the vulnerability zone of the Adrian facility, which includes 350,000 people. The CWA represents water treatment facilities in New Jersey and Massachusetts and its IUE division represents a number of chemical facilities that are likely to be covered by the legislation.

Our members are concerned that their workplaces and communities are not adequately protected from deadly terrorist attacks on chemical facilities and drinking water systems. The Department of Homeland Security (DHS) has identified approximately 7,000 high-risk U.S. chemical facilities and classified them into four tiers. According to a 2008 Congressional Research Service review of Environmental Protection Agency (EPA) data¹, 100 U.S. chemical plants each put 1 million or more people at risk, including the Detroit wastewater plant, where UAW members work.

Requiring Facilities to Implement Their Own Plans to Reduce the Consequences of a Terrorist Attack

The CWA-UAW Legislative Alliance believes the government should have the authority to require a facility to implement its own plans to reduce the potential consequences of a terrorist attack. The bipartisan Partnership for a Secure America (PSA), whose advisory board includes Howard Baker, Warren Rudman, Zbigniew Brzezinski and other prominent Democrats and Republicans known for their national security expertise, has called for the use of safer and more secure technologies to reduce the consequences of a terrorist attack as a national security priority. In a report entitled *Chemical Terrorism: US Policies to Reduce The Chemical Terror Threat*² (which we have submitted for the record), PSA has stated:

[I]t is essential to reduce the risk that terrorists could attack an industrial chemical facility as a means to cause the release of a plume of toxic vapor and inflict mass casualties, or to inflict economic damage by destroying a key element of the nation's critical infrastructure.

PSA also stated that "the development of inherently safer, economically beneficial, and efficient technology should be prioritized."

¹ Shea DA (2008). *Memorandum to Honorable Edward Markey Re: RMP Facilities in the United States as of February 2008*. Washington DC: Congressional Research Service.

² Kosal ME (2008). *Chemical Terrorism: US Policies to Reduce the Chemical Terror Threat*. Washington DC: Partnership for a Secure America.

Protecting Jobs

Requiring implementation of a facility's own proposed methods to reduce the potential consequences of a terrorist attack will not pose a threat to jobs. A European study of a broader category of technological changes that includes safer and more secure technologies found that these changes had no significant impact on employment³. We also have the specifically-documented case of a Schweitzer-Mauduit paper mill in New Jersey, which converted from using rail cars of chlorine gas to generating chlorine dioxide on site. No jobs were lost as a result of this conversion⁴. In contrast, jobs can be lost when disasters strike facilities, whether intentionally or unintentionally caused. On July 7, 2009 the Delco Times, a Philadelphia area newspaper, reported that 40-50 jobs will be lost because Sunoco has decided not to rebuild an ethylene unit that was damaged in an explosion that took place on May 17 of this year⁵.

The CWA-UAW Legislative Alliance believes that H.R. 2868 contains all the language necessary to protect jobs. Specifically, the bill requires the Secretary of Homeland Security to show that implementation of methods to reduce the consequences of a terrorist attack "would not significantly and demonstrably impair the ability of the owner or operator of the covered chemical facility to continue the business of the facility at its location." We believe this language is adequate to protect jobs. Adding more analysis or administrative law review will simply hinder the implementation of necessary security measures without truly protecting jobs.

In addition, the CWA-UAW Legislative Alliance urges the Subcommittee to move very carefully if it seeks to craft any special provisions for small businesses. Exempting

³ Getzner M (2002). The quantitative and qualitative impacts of clean technologies on employment. *Journal of Cleaner Production* 10: 305-319.

⁴ Patel D Engler R and Coyle D. (2008). *Still at Risk: Protecting New Jersey Jobs, Families, and Hometowns From Toxic Chemical Disasters*. Trenton: New Jersey Work Environment Council. <http://www.njwec.org/PDF/Still%20at%20Risk%20Report%20Oct%2008.pdf>

⁵ <http://www.delcotimes.com/articles/2009/07/07/opinion/doc4a5328eaf27dd959040181.txt> (Accessed July 20, 2009)

businesses that meet the Small Business Administration's definition of small business could potentially result in exempting some of the highest risk facilities in the country, including one that puts 12 million people at risk. Moreover, it was a small business in South Carolina that released the ammonia that killed a woman and sent five employees and two others to the hospital on Wednesday, July 15 of this year⁶. Any help provided to small businesses should be narrowly tailored and make it possible for the government to give substantial weight to the degree of the security risk, as well as the size of the facility.

Protection Against Abuse of Background Checks

The CWA-UAW Legislative Alliance recognizes the reasons why DHS believes that background checks are a necessary part of security. However, because it is extraordinarily difficult to question actions taken in the name of security, we believe the language needs to be carefully written so as not to provide an opportunity for unscrupulous employers to go on fishing expeditions. The purpose of H.R. 2868 is not to enhance or diminish the legal rights of employers to conduct general background checks or to use the information for reasons other than protecting facilities from terrorist attacks.

We are partially satisfied with the protections and the redress processes that have been put in H.R. 2868 to prevent abuse of background checks and the information collected in such checks. In particular, we are pleased that the only crimes that can form the basis of an adverse employment decision are felonies. We are pleased with the limits as to how far in the past an employee's background can be investigated and we are pleased with the limits on the information collected. We are also pleased that persons subject to an adverse employment decision will receive full wages and benefits until their appeals are exhausted. We believe that Section 550 of the Homeland Security Appropriations Act of 2007, which is the statutory basis for the existing Chemical Facility Anti-Terrorism Standard (CFATS), does not provide adequate protection against abuse

⁶ http://www.nytimes.com/2009/07/16/us/16brfs-AMMONIACLOUD_BRF.html (Accessed June 20, 1009).

of background checks. If H.R. 2868 is to replace Section 550, it needs additional language to correct that deficiency. One example of the problems with Section 550 is the DHS Guidance document, promulgated under Section 550, that encourages companies to interview friends, neighbors and family members and investigate misdemeanors, credit history, military service, civil court records and education⁷.

We believe that the following crucial improvements to H.R. 2868 still need to be made to correct deficiencies in the protection provided against abuse of background checks:

1. *Clarify that, with the exception of permanent disqualifying offenses, adverse employment decisions under the Chemical Facility Anti-Terrorism Act should be made only pursuant to a determination by DHS that an individual's offenses could cause the individual to be a terrorism security risk.* This is similar to what is done in the transportation sector. It would be a significant step back to say that, in the chemical sector, an employer can make an adverse employment decision WITHOUT a security threat determination. It is important that decisions made under the Chemical Facility Anti-Terrorism Act be made on the basis of a terrorism security risk so that the national interest in guarding against terrorism is served. But this legislation should not create a refuge for unscrupulous employers on fishing expeditions. It is equally important that this determination not be made by the employer in order to ensure that it is based on an objective analysis of the evidence. DHS has the capacity, experience and expertise to do so.
2. *Require that an employee subject to an adverse employment decision be informed of the basis for that decision and of the right to appeal and/or file for a waiver.* The National Employment Law Project has found that nearly 100% of the appeals filed by port transportation workers on the grounds that information

⁷ United States Department of Homeland Security: Office of Infrastructure Protection, Infrastructure Security Compliance Division (DHS, 2009). *Risk-Based Performance Standards Guidance: Chemical Facility Anti-Terrorism Standards*. Washington, DC: DHS.
http://www.dhs.gov/xlibrary/assets/chemsec_cfats_riskbased_performance_standards.pdf

reported in the background check was inaccurate were successful. Similarly, almost all of the waivers filed on the grounds that the individual had been rehabilitated since the crime and no longer posed a security risk were successful. Yet 13,000 individuals suffered adverse employment decisions because they were unaware of how to gain access to the appeal and waiver process⁸.

3. *Grant any employee who is subject to an adverse employment decision the option to exercise any rights the employee has under a collective bargaining agreement without foregoing the right to appeal or file for a waiver as guaranteed by H.R. 2868.* Such language would prevent the use of this bill to undermine protections that are recognized in collective bargaining agreements.
4. *Add to the annual report by DHS to Congress, required by H.R. 2868, a section requiring the Department to report the number workers subject to background checks, the number of adverse employment decisions, number of appeals and waivers pending, number of successful appeals and waivers, and the number of appeals and waivers denied.* The purpose of this is to enable Congress to effectively evaluate the impact of the background check provisions.
5. *Codify in statute the existing DHS regulatory language that protects individuals who have had a fully equivalent federal background check from having to undergo a second background check.* This will render the process more efficient and protect workers from unnecessary delays.

Worker Participation

The CWA-UAW Legislative Alliance believes that vulnerability assessments and security plans can benefit from workers' direct and current knowledge and experience of

⁸ National Employment Law Project (NELP, 2009). *A Scorecard on the Post-9/11 Port Worker Background Checks: Model Worker Protections Provide a Lifeline for People of Color, While Major TSA Delays Leave Thousands Jobless During the Recession*. New York: NELP.
http://nelp.3cdn.net/0714d0826f3ecf7a15_70m6i6fwb.pdf

plant operations, and from the knowledge of union staff, who enter multiple facilities in the course of their work and can bring the best non-proprietary ideas from one facility to another. Including workers and their representatives in this process will enhance security and protect against terrorist attacks at chemical facilities. For these reasons, we are pleased that both H.R. 3258 and H.R. 2868 grant employees and their representatives the right to participate in vulnerability assessments and site security plans, including participation in assessment of methods to reduce the consequences of a chemical release from an intentional act.

The CWA-UAW Legislative Alliance also is pleased that H.R. 2868 requires facilities to provide copies of the vulnerability assessment and site security plan as submitted to DHS to the employees and representatives who participated. However, we are disappointed with the limited provision of these documents under the H.R. 3258. The bill directs the EPA Administrator to provide procedures for sharing all portions of a vulnerability assessment and site security plan relating to the roles and responsibilities of employees with the employees and/or employee representatives who participated in their creation. Unfortunately, it lacks a clear requirement that the assessment of methods to reduce the consequences of a chemical release from an intentional act must be shared with employees and/or employee representatives who participated in their creation. This would allow an unscrupulous employer to change the assessment prior to submitting it to EPA. Those who had participated in the assessment would have no way to know this.

The CWA-UAW Legislative Alliance does not believe there should be any restrictions on which employees or representatives can be chosen to participate in vulnerability assessments and site security plans. No matter how well-intended the criteria, it is not possible to anticipate, in the halls of Congress, exactly which kind of expertise will be most suited to a particular facility. We fear that placing restrictions in the statute will permit a rare but all-too-real obstructionist employer to block a chosen employee representative on the grounds that that representative's particular knowledge, experience, training or education was not listed in the statute.

Both H.R. 2868 and the H.R. 3258 grant government inspectors the right of access to employees and employee representatives. But unlike the Occupational Safety and Health Act of 1970, they grant no rights to employees or to their representatives. The CWA-UAW Legislative Alliance believes that employees and their representatives should have a right to accompany a chemical security inspection. If this right is not written into law, neither employees nor their representatives may be notified of an inspection or offered a meaningful chance to participate. Employees and their representatives routinely participate in OSHA inspections, where their legal rights are explicit.

Employee Training

The CWA-UAW Legislative Alliance is pleased with the employee training language in H.R. 2868. We oppose any attempt to remove the language requiring employees to be trained in methods to reduce the consequences of a terrorist attack. We believe such training will make employees very valuable partners in reducing facility vulnerability.

H.R. 3258 includes language providing for a worker training grant program. A similar program was included in the version of H.R. 2868 reported by the Committee on Homeland Security. The CWA-UAW Legislative Alliance trusts that a similar program will be included in H.R. 2868 when it is reported by this Subcommittee.

Information for Accountability

The CWA-UAW Legislative Alliance would like to see the provisions in the bill related to government accountability strengthened in a number of ways. As important as it is not to let damaging information get into the wrong hands, it is equally important to let the public get access to enough information so it can know that our government, our potentially vulnerable facilities and other responsible parties are doing everything required to protect us from terrorist attacks. For this reason it is important to ensure that

access to basic facility identification and regulatory status information not be restricted. Such basic information will help develop public confidence in the chemical security program by allowing people to know that the chemical facility and drinking water facility security programs are working as they should to keep us secure.

In addition, the number of facilities that have been assigned to different tiers or are no longer regulated due to implementation of a method to reduce the consequences of a terrorist attack should be reported annually to Congress along with descriptions of the types of methods implemented. For example, a report might indicate that, in the past year, ten previously regulated facilities switched from chlorine gas to liquid chlorine bleach while twelve switched to ultraviolet light. This will not disclose any protected information. In addition, we recommend adding to the H.R. 3258 a requirement for reporting on procurement policies for water utilities that, if applied, would reduce or eliminate reliance on a threshold quantity for a substance of concern.

H.R. 3258 provides for criminal penalties of up to a year in jail for those who disclose protected information about the vulnerability of a drinking water system to terrorist attack. Yet for the owners and operators of a facility who leave the employees and the public vulnerable by non-compliance, there are only civil penalties. We believe this disparity should be corrected. Our members should be able to communicate about pressing safety and security concerns, so long as their communication does not directly replicate materials in vulnerability assessments and security plans, or is derived from sources other than vulnerability assessments or security plans.

Many parties play a role in improving industrial practices, including regulatory agencies, academic institutions, state and local governments, employees and employee representatives, national laboratories, inventors, private sector safety and security experts, and vendors of alternate technologies. For this reason, information on alternative technologies should be made available to these parties to the maximum extent consistent with security and with intellectual property law.

In conclusion, the CWA-UAW Legislative Alliance believes that now is the time to ensure the security of our chemical facilities and drinking water systems and the Americans who work in them and live near them. The existing CFATS regulations are inadequate. It is imperative that Congress move forward on true chemical and drinking water security. We strongly support passage of H.R. 2868 and H.R. 3258. We urge the Subcommittee to act now to protect America from a terrorist attack on our chemical facilities and drinking water systems. The CWA-UAW Legislative Alliance looks forward to working with the Members of this Subcommittee and the entire House to address this crucial problem. Thank you.

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